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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 NIKKI POOSHS,

12 Plaintiff,

No. C 04-1221 PJH

13 v.

14 PHILLIP MORRIS USA, INC., et al.,

**ORDER RE DEFENDANTS'
CATEGORICAL OBJECTIONS TO
PLAINTIFF'S EVIDENCE**

15 Defendants.

16 /
17 In the April 2, 2014 Fifth Final Pretrial Order, the court ordered the parties to submit
18 "categorical objections" – with representative examples – to the proposed trial evidence.
19 The court stated that it would advise the parties thereafter whether it would hold a half-day
20 hearing on the parties' categorical objections, as plaintiff requested.

21 On May 27, 2014, defendants filed categorical objections to plaintiff's proposed
22 witness lists, exhibit lists, written deposition designations, and written discovery
23 designations. This was not a joint filing, and plaintiff did not file anything separately. On
24 June 2, 2014, the court issued an order noting that it had requested a joint submission, and
25 that it was anticipating a list of representative examples in categories of type of evidence,
26 but that the submission had been made by defendants only, with an emphasis on "subject"
27 categories.

28 The court reiterated that it does not have the time, resources, or inclination to read

1 every single exhibit, discovery designation, and deposition in this case, and added that it
2 believed that what was required was a joint submission identifying jointly identified specific
3 examples of evidence in the categories of exhibits, deposition designations, written
4 discovery designations, and proposed witness testimony, followed by plaintiff's arguments
5 as to why the evidence does not violate a prior order and is otherwise admissible, followed
6 by defendants' arguments as to why the evidence does violate a prior order and is
7 otherwise inadmissible.

8 The court requested that the joint filing be submitted by June 30, 2014. The court
9 added, however, that should the parties instead prefer a ruling on the categorical objections
10 made by defendants, in lieu of the above-described procedure, plaintiff should file a
11 response no later than June 16, 2014.

12 On June 16, 2014, plaintiff filed a response to defendants' May 27, 2014 categorical
13 objections. Plaintiff argues that defendants' objections should all be overruled, or in the
14 alternative, that the court should "reserve its evidentiary ruling until trial where proper
15 foundations will be laid for every item of proffered evidence," or, as a second alternative,
16 that the court should "order the parties to meet and confer in the presence of the [c]ourt on
17 exhibits." As for that last alternative, plaintiff proposes that the court "select[] some of the
18 proffered categories," and that the parties could then

19 appear and present three examples of evidence that fall into each category
20 selected by the [c]ourt. The parties could then explain through their selected
21 examples the relevance or the prejudice they would suffer if these items were
22 admitted into evidence. This type of brief mock presentation would decrease
the [c]ourts [sic] work load because the burden would be on the parties to
present the evidence, and may assist the [c]ourt in ruling on objections, by
giving it a preview of the evidence that will be presented at trial.

23 Pltf's Response at 27-28.

24 To date, the court has devoted an undue amount of time and judicial resources to
25 this case, largely because of plaintiff's recalcitrance and refusal to comply with the court's
26 settled pretrial procedures. Plaintiff and her counsel have repeatedly been instructed that
27 the admissibility of evidence presented in any trial conducted by the undersigned will be
28 largely determined in advance of trial. Thus, the court rejects plaintiff's first alternative. As

1 for plaintiff's second alternative, the court finds that far from decreasing the court's
2 workload, the proposed procedure would be overly time-consuming and would further drag
3 out what has become a nearly intolerable exercise in pretrial preparation.

4 Given the lack of a joint submission, the court finds it unnecessary to hold a hearing
5 on the categorical objections, and hereby rules as follows.

6 1. Exhibits exceeding 250

7 Defendants request that the court strike all exhibits on plaintiff's exhibit list after the
8 first 250 exhibits. This is the number of exhibits that plaintiff's counsel previously asserted
9 (at the March 27, 2014 pretrial conference) comprised the list. Defendants contend that
10 they have repeatedly requested that plaintiff provide the list of 250 exhibits that are
11 supposedly going to be introduced a trial, and that each time, plaintiff has failed to do so.

12 Defendants contend that the Second Supplemental Exhibit List (Doc. 343, filed Sept.
13 3, 2013) contains 401 entries in the "will use" section alone, many of which are "composite
14 exhibits" containing multiple individual documents. Defendants assert that the 401 entries
15 in the "will use" list actually comprise 13,814 individual exhibits, with a total of 75,636
16 pages. Defendants contend that there is no way plaintiff will be able to present 401 exhibits
17 to the jury, let alone 13,814 exhibits consisting of more than 75,000 pages.

18 In addition, defendants point to three particular exhibit designations, including one
19 exhibit that consists of more than 12,000 advertisements, and another exhibit of "Expert
20 Reliance Materials" that includes more than 250 sub-exhibits. They also note an entry on
21 the exhibit list for "PT Cummings," which is described as encompassing "[a]ll current and
22 previous reliance materials and previously introduced exhibits of and through Dr. Michael
23 Cummings," whom defendants claim has testified in 55 smoking-and-health trials over the
24 course of 17 years.

25 In response, plaintiff asserts that defendants are asking the court to strike evidence
26 simply because they don't like the way it is organized. She does not respond to
27 defendants' assertion that the "will use" list includes more than the agree-upon number of
28 entries. As for the argument regarding composite records, plaintiff asserts that this is not a

1 "category" of evidence that can support a categorical objection, that defendants' exhibit list
2 also includes composite exhibits, and that it is common at trial for "things like medical
3 records, reliance materials, employment records, social security records" to be listed as
4 composite exhibits. She asserts that once the court has ruled on the Offer of Proof, she
5 will meet and confer with defendants to agree on permissible composite exhibits.

6 This objection is SUSTAINED in part and OVERRULED in part. Following the
7 issuance of this order and the order regarding plaintiff's Offer of Proof, plaintiff will be
8 allowed two weeks to narrow the list to 250, and the parties thereafter will be given one
9 week to meet and confer should plaintiff persist in including many thousands of exhibits as
10 "composite exhibits."

11 Plainly, a composite exhibit that includes 12,000 pages of advertisements is not
12 usable at trial, and thus would not be admissible. Similarly, a composite exhibit that
13 includes 250 sub-exhibits would not be usable. Such designations run counter to the
14 court's directive that plaintiff provide a finite list of "will use" exhibits. As for the designation
15 "PT Cummings," which was accompanied by no actual exhibits, that is incomprehensible.
16 Nevertheless, the court will take plaintiff's counsel at their word that they plan on meeting
17 and conferring with defendants to narrow down the list and resolve the dispute regarding
18 the composite exhibits once the court has ruled on the Offer of Proof. Should they fail to do
19 so, the court will exclude the composite exhibits.

20 2. Prior testimony designations

21 Defendants request that the court strike all "prior-testimony designations" on the
22 basis that many of the designations violate prior orders of the court and plaintiff continues
23 to refuse to remove them from the list. Defendants do not provide any examples of
24 improper designations that remain on the list.

25 In addition, defendants assert that while plaintiff has withdrawn some of the improper
26 designations, she has also added new designations of prior testimony in the course of
27 revising the designations, and that some of these are also improper. Defendants provide
28 one example, an excerpt from the Oct. 5, 2011 deposition testimony of Richard Jupe

1 (Declaration of Conin Schreck ("Schreck Decl.") Exh. 4) (testimony re low-tar and low-
2 nicotine cigarettes), which they contend references cigarette design (and is discussed
3 under the "cigarette design" category below).

4 Plaintiff does not respond to this objection as such, though there may be some
5 response subsumed within the category of prior-testimony designations. On the other
6 hand, defendants have provided only one example. In theory, the court is amenable to
7 striking any designation that violates one of the prior evidentiary rulings. However, the
8 court is unable to provide a more specific ruling in the absence of additional examples.
9 Should plaintiff attempt to introduce any evidence at trial in a category that has previously
10 been ruled inadmissible by the court – e.g. cigarette design evidence – defendants will
11 have to object at that point, and the court will sustain the objection without argument.

12 3. Post-1987 evidence

13 Defendants assert that plaintiff has included some post-1987 evidence that
14 continues to violate the court's prior orders. Defendants list news articles from 1997 and
15 1998 (discussing contemporaneous trial testimony by Philip Morris executives), statements
16 made on Philip Morris' website in 2000, a May 1998 press release, and statements made in
17 2000 on Philip Morris' website (Schreck Decl. Exh. 5). Defendants also list excerpts from
18 depositions of Peter Lipowicz, Sir Richard Doll, Christopher Cook, and James Figlar, and
19 trial testimony excerpts from Geoffrey Bible and Walker Merryman (id. Exhs. 6-11)
20 referencing events that occurred post 1987.

21 Defendants note that plaintiff has argued that such designations should be
22 admissible because they may provide information about the period before 1988, but argue
23 that even if that is true, plaintiff has ignored the overwhelming and unnecessary prejudice
24 that such designations would cause because of the likelihood that jurors will hold
25 defendants liable for conduct during periods when they are immune.

26 Defendants note that the court previously sustained defendants' post-1987
27 objections in their entirety (although it did not comment on particular testimony).
28 Defendants assert that they previously objected to all trial testimony of Philip Morris' former

1 CEO, Geoffrey Bible, on the basis that he testified in 1998 that his personal knowledge of
2 his employer's operations did not extend to the period before 1987, and also the testimony
3 that he was familiar with U.S. operations only for the prior 10 years, because before that he
4 was working overseas in international operations until that time. See Docs. 330, 359; see
5 also Schreck Decl. Exh. 7.

6 In response, plaintiff agrees that evidence pertaining to alleged tortious conduct by
7 defendants after December 31, 1987 has been excluded by the court, but argues that
8 defendants are attempting to "broaden this category to ridiculous results" by attempting to
9 have all post-1987 evidence excluded. Plaintiffs contend that this position is too extreme
10 because it would exclude evidence of her cancer diagnosis and treatment.

11 In addition, plaintiff argues that defendants are trying to exclude documents dated
12 after 1987 even though they may be relevant, such as medical and science articles, or
13 post-1987 documents that discuss defendants' pre-1987 conduct. Plaintiff contends that
14 defendants are going as far as objecting to the depositions of their own corporate
15 representatives that were taken after 1987, and are objecting to designations on the ground
16 that they contain un-designated portions that relate to time periods after 1987. She asserts
17 that to the extent any of these excerpts might be prejudicial, the court can solve that
18 problem by issuing a limiting instruction telling the jury not to consider any evidence of
19 events or conduct after 1987.

20 Plaintiff does not respond to defendants' argument that the Bible trial testimony
21 should be excluded in its entirety because Mr. Bible's involvement with and responsibility
22 for Philip Morris' domestic (U.S.) tobacco activities began in April 1993 (during California's
23 immunity period); and because Mr. Bible testified that he had not studied or been informed
24 about the history of Philip Morris' or the tobacco industry's conduct before 1993.

25 As for the specific examples provided by defendants, plaintiff comments as to three
26 of those. First, with regard to the excerpt from the March 2, 1998 trial testimony of
27 Geoffrey Bible (Schreck Decl., Exh. 7), Mr. Bible was asked whether it was true that from
28 1954 up to today, Philip Morris had never said smoking causes lung cancer, and he

1 responded, "I think that's a fair, accurate description. We have made our position very
2 clear on it." Defendants object because this testimony covers a period that post-dates
3 1987. They renew their prior objection (Docs. 330, 359) to all designations from prior
4 testimony by Mr. Bible, on the ground that he was testifying in those transcripts as a fact
5 witness, and he clearly indicated that his personal knowledge of Philip Morris' conduct in
6 the United States was limited to the period after 1987.

7 Plaintiff argues that this excerpt from the Bible testimony is admissible because it
8 shows Philip Morris' public position on smoking and lung cancer during the relevant period
9 when plaintiff started smoking cigarettes. She asserts that it would be unfair and
10 prejudicial to exclude this testimony simply because it was provided during the "immunity
11 period." She also contends that it is relevant to the failure-to-warn and concealment
12 claims. She does not address Bible's testimony that he lacked personal knowledge of the
13 pre-1987 period.

14 The objection is OVERRULED, but the evidence will nonetheless be EXCLUDED
15 because Mr. Bible testified that he had no personal knowledge of the period preceding
16 1987, as he did not work for Philip Morris in the U.S. prior to that time. In addition, the
17 court agrees with defendants that the entirety of the Bible trial testimony should be
18 EXCLUDED for the same reason – that Mr. Bible testified that his responsibility for Philip
19 Morris' U.S. tobacco activities began in April 1993, after the commencement of California's
20 immunity period.

21 Second, with regard to the excerpt from the May 31, 2002 trial testimony of Sir
22 Richard Doll (an epidemiologist working in the field since the 1960s) (Schreck Decl., Exh.
23 8), he was asked in the cited excerpt whether it was true that in England by the 1960s the
24 tobacco industry no longer denied that smoking cigarettes caused lung cancer, and
25 whether it was true that at the same time in the U.S. the tobacco industry was still denying
26 that there was any causal connection. He responded "Yes" to both, adding that it was his
27 "understanding" that in the U.S. the tobacco industry continued to deny it well into the
28 1990s. Defendants object to this testimony on the basis that it covers the period after

1 1987.

2 Plaintiff argues that this excerpt is admissible because it relates to defendants'
3 knowledge and conduct in the 1960s, and that it should not be excluded simply because his
4 comment extends into the period after 1987. She contends that this testimony is relevant
5 to the failure-to-warn and concealment claims.

6 This objection is OVERRULED, but the evidence will nonetheless be EXCLUDED as
7 stated below, because it pertains to "the tobacco industry," which is not a defendant in this
8 case.

9 Third, with regard to the excerpt from the July 21, 2011 deposition testimony of RJR
10 representative Dr. Christopher Cook (Schreck Decl. Exh. 9), he was asked when RJR first
11 admitted publicly that smoking cigarettes was a cause of lung cancer, and he responded,
12 "2000." Defendants object to this testimony because it was given post-1987 and relates to
13 a period after 1987. Plaintiff argues that it is admissible because it establishes that RJR
14 never admitted publicly prior to 1987, when plaintiff was still smoking cigarettes, that
15 smoking causes lung cancer. She asserts that it would be unfair to exclude this testimony
16 simply because it relates to a period that extends past 1987, and that it is relevant to the
17 failure-to-warn and concealment claims.

18 The objection is SUSTAINED. This 2011 testimony relates to the period 2000, and
19 thus is outside the pre-1987 period. Moreover, at most, all that it establishes is that in Dr.
20 Cook's view, RJR first admitted in 2000 that smoking causes cancer, but it does not, as
21 plaintiff claims, establish that RJR "never admitted publicly" prior to 1987 that smoking
22 causes cancer.

23 4. Aggregate harm evidence

24 Defendants contend that plaintiff's most recent designations include approximately
25 141 pages of prior testimony regarding "aggregate harm evidence" – evidence against the
26 entirety of the cigarette industry, or against cigarette manufacturers other than Philip Morris
27 and RJR – which the court previously ruled is not admissible.

28 As examples, defendants list two excerpts of deposition testimony from Philip Morris

1 representative Peter Lipowicz (referencing "the tobacco industry" and "tobacco
2 manufacturers and their spokesmen") (Schreck Decl. Exhs. 6, 13); two excerpts of
3 deposition testimony from Philip Morris representative Jeanne Bonhomme (referencing "the
4 tobacco industry") (id. Exh. 14); one excerpt of deposition testimony from Sir Richard Doll
5 (referencing "the tobacco industry") (id. Exh. 8), and one document reciting statistics
6 attributed to the tobacco industry as a whole (id. Exh. 15).

7 In response, plaintiff agrees that the court previously excluded evidence of
8 aggregate harm, although she claims not to understand which evidence falls into this
9 category, and asserts that defendants' definition appears to have "no limit." She also
10 complains that the designations and exhibits defendants have identified are taken out of
11 context.

12 Plaintiff addresses only one of defendants' examples – an excerpt of deposition
13 testimony from Peter Lipowicz (Schreck Decl. Exh. 6). However, the two Lipowicz
14 examples cited by defendants are one excerpt from the Oct. 12, 2011 deposition (106:9-
15 18), and a second excerpt from a May 17, 2012 deposition.

16 In the first excerpt (106:9-18), it appears that counsel is asking Mr. Lipowicz a
17 question, in the form of reading a passage from a document. It is impossible to tell what
18 the document is, who wrote it, or even what the question is. In her response, plaintiff
19 quotes part of the statement/question, which is "And then it goes on to say: 'In the face of
20 this evidence, the response of the tobacco manufacturers and their spokesman has been
21 deplorable" but then plaintiff adds a response, "That is not correct" which does not appear
22 in the excerpt. In any event, plaintiff disputes that the cited excerpt applies to the tobacco
23 industry as a whole, and claims that it applies directly to Philip Morris. However, she does
24 not identify any reference to Philip Morris in the excerpt.

25 Plaintiff cites a second excerpt (Lipowicz Depo. 106:19-107:11), which appears in
26 the transcript following the excerpt cited above, but which is not one of the examples
27 provided by defendants. In this excerpt, Mr. Lipowicz was asked whether he would have
28 expected Phillip Morris to have been aware of a particular article in the New England

1 Journal of Medicine in 1960 regarding "tobacco manufacturers," and he answered, "Yes."
2 However, defendants have not objected to this excerpt, so it is not clear what point plaintiff
3 is hoping to make.

4 At the end of this section, plaintiff requests that the court "define what it meant when
5 it granted [d]efendants [sic] motion in limine on 'aggregate harm.'" She says she
6 understood the term to mean harms other than lung cancer – i.e., that it would be
7 prejudicial to introduce evidence that millions of people die each year from COPD. She
8 complains that defendants' definition is "all inclusive," and that they have even suggested
9 that lung cancer statistics relied upon by experts to demonstrate a causal link between
10 plaintiff's lung cancer and her smoking are inadmissible under the court's ruling.

11 Defendants' objections are SUSTAINED in part and OVERRULED in part. Plaintiff's
12 arguments about the second Lipowicz excerpt are non-responsive, as defendants posed no
13 objection to that excerpt in this section of the argument. (They do object to it in another
14 part of the argument because it is evidence relating to "cigarette manufacturers.") With
15 regard to the first Lipowicz excerpt, the portion cited by defendants is a question ("I did
16 read that correctly, did I not?"), and the only response ("Yes, you read that correctly.")
17 cannot be considered "testimony." Thus the basis for the objection is unclear.

18 Further, the court does not understand how plaintiff can claim to be confused
19 regarding defendants' use of "aggregate harm" in their objections to the designations. In
20 the Preliminary Final Pretrial Order (Doc. 289), the court granted Philip Morris' motion in
21 limine to exclude evidence of the "aggregate harm" allegedly caused by smoking, noting
22 that it was unclear what evidence defendant was seeking to preclude, but stating that it
23 would "not allow the introduction of evidence against the entirety of the cigarette industry,
24 or against cigarette manufacturers other than the defendants that remain in the case."
25 Later, in the Third Final Pretrial Order (Doc. 337), the court sustained defendants'
26 objections to deposition designations relating to evidence of harm purportedly caused by
27 cigarette smoking on entire populations, which defendants had also referred to in their
28 objections as "aggregate harm."

1 Regardless of the label, plaintiff's claim to be confused by the meaning of those two
2 prior evidentiary rulings is a bit disingenuous, particularly in light of her suggestion that
3 what the court really intended to exclude was evidence of harms other than lung cancer
4 (the subject of a separate in-limine ruling). To the extent that plaintiff is genuinely confused
5 as to the nature of the evidence that has been excluded by the relevant portions of those
6 two orders, the court anticipates that the following will resolve the problem: In line with the
7 court's prior orders, evidence against the entirety of the cigarette industry or against
8 cigarette manufacturers other than Philip Morris or RJR is EXCLUDED; evidence relating to
9 harm purportedly caused by cigarette smoking on entire populations is EXCLUDED; and
10 evidence of plaintiff's injuries other than lung cancer is EXCLUDED.

11 5. Cigarette-design evidence

12 Defendants assert that plaintiff has included "cigarette-design evidence" that violates
13 prior orders. In support, they cite to two excerpts from the deposition testimony of Peter
14 Lipowicz (Schreck Decl. Exhs. 6, 13); an excerpt from the deposition testimony of Richard
15 Jupe (*id.*, Exh. 4); two excerpts from the deposition testimony of Jeanne Bonhomme (*id.*
16 Exhs. 14, 16); two excerpts from the trial testimony of Geoffrey Bible (*id.*, Exhs. 7, 17); and
17 an excerpt from the deposition testimony of Jeff Gentry (*id.*, Exh. 18). In addition,
18 defendants assert that plaintiff has improperly included at least 20 documents on her
19 exhibit list that relate to cigarette design, and they cite to five of them (Schreck Decl. Exh.
20 19).

21 In response, plaintiff argues that in order to prove her failure-to-warn and
22 concealment claims, she must present evidence regarding defendants' cigarettes and the
23 fact that the use of those cigarettes causes cancer. She complains that defendants are
24 arguing that any testimony or evidence that is even tangentially related to cigarettes is
25 "design" testimony. For example, she claims that defendants object to any description
26 saying, e.g., "cigarettes are made out of tobacco" and/or mentioning that some cigarettes
27 have filters. Plaintiff finds it impossible to conceive how defendants might be prejudiced by
28 such statements.

1 As a general proposition, defendants' objection to cigarette-design evidence is
2 SUSTAINED, based on the court's prior rulings. The difficulty lies in determining which of
3 the challenged designations and exhibits actually constitute evidence of cigarette design.
4 Some of defendants' objections are meritorious, but others are not.

5 Plaintiff cites to only three of the examples provided by defendants – one excerpt
6 from the Bible trial testimony, the excerpt from the Jupe deposition testimony, and one of
7 the proposed exhibits. First, with regard to the excerpt from the March 8, 1998 Bible trial
8 testimony (Exh. 17) 5921-5924 (discussing carcinogenicity in relation to nitrosamines and
9 other compounds), plaintiff cites a portion of that testimony at 5921-5922, where Mr. Bible
10 is asked whether the notion that hundreds of compounds in smoke may be carcinogenic is
11 "consistent with previous documents we saw of Philip Morris which identified many
12 carcinogens in smoke," to which Mr. Bible responded, "Yes," and then agreed that Philip
13 Morris "had knowledge of that for a number of years prior to 1963."

14 Plaintiff argues that Mr. Bible's testimony is not being offered for cigarette "design"
15 but rather to show defendants' knowledge and concealment of the hazards of smoking.
16 Plaintiff asserts that defendants publicly denied for decades that smoking cigarettes caused
17 cancer, and that this evidence shows that defendants were aware from the early 1960s that
18 cigarette smoking contained many carcinogenic compounds. Plaintiff contends that this
19 evidence is relevant to the failure-to-warn and concealment claims.

20 The court finds that this discussion of carcinogens in cigarette smoke is not related
21 to cigarette design, but rather to the question whether Philip Morris was aware of the
22 existence of those carcinogenic compounds.

23 Second, with regard to the excerpt of Oct. 5, 2011 deposition testimony of Philip
24 Morris corporate representative Philip Jupe (Exh. 4) (asking Mr. Jupe whether his company
25 hoped that people who were worried about their health would buy low-tar/low-nicotine
26 cigarettes in the belief that they were safer), plaintiff cites to that testimony at 290:19-
27 292:7, including Mr. Jupe's response, which is "We developed low-tar and low-nicotine
28 cigarettes because we did believe we were reducing the risk of cigarette smoking. Did we

1 market these cigarettes as low tar? Yes we did. Were they communicated to the
2 consumers as being safer? Not necessarily." However, the only portion of that testimony
3 that defendants cite is the question itself (not actually Mr. Jupe's response), which is at
4 291:19-22.

5 In any event, plaintiff's argument is that defendants have mis-characterized this
6 testimony as "design" testimony, and that in actuality it relates to Philip Morris' knowledge
7 regarding low-tar/low-nicotine cigarettes. She asserts that other evidence will show that
8 Philip Morris knew that low-tar/low-nicotine cigarettes were not safer. She claims that
9 Philip Morris concealed that fact from her, and that Mr. Jupe's testimony demonstrates that
10 defendants allowed plaintiff to believe that low-tar/low-nicotine cigarettes were safer. She
11 asserts that this evidence is relevant to the failure-to-warn and concealment claims.

12 The question whether particular cigarettes were "low tar" or "low nicotine" certainly
13 implicates cigarette design. In the case of this particular deposition excerpt, however, the
14 issue is whether Philip Morris hoped that its customers would buy particular cigarettes
15 (designated "low-tar, low-nicotine") in the belief that they were safer.

16 Third, with regard to the September 18, 1963 letter from Brown & Williamson (part of
17 Exh. 19), discussing at some length the impact of nicotine and sugar on quality, and how
18 to vary the levels of each "to win consumer preference for our brand," and which states that
19 nicotine in cigarettes "positively correlated with smoker response," plaintiff argues that she
20 intends to use this letter to show defendants' knowledge regarding why users of cigarettes
21 continue to smoke.

22 According to plaintiff, defendants intend to argue that she could have quit smoking at
23 any time, and that the only reason she didn't is that she wanted to continue to smoke. She
24 claims that if she had been able to quit sooner she might not have developed lung cancer,
25 and she intends to argue that "smokers response" is part of the reason she did not quit
26 earlier. She asserts that defendants knew as early as 1963 that smoking was addictive,
27 and that it would be hard to quit. She argues that this evidence is relevant to the failure-to-
28 warn and concealment claims.

1 This document clearly appears to involve issues of cigarette design, as it talks (in a
2 round-about way) about what combination of sugar and nicotine would cause smokers to
3 prefer "our brand" over others. Thus, it will be EXCLUDED on that basis. (Moreover, what
4 plaintiff refers to as "smokers response" appears to be another term for "addiction" – which
5 cannot be claimed as an injury in this case.)

6 6. Evidence regarding non-lung cancer conditions

7 Defendants claim that plaintiff has included some evidence regarding non-lung
8 cancer conditions, in violation of prior orders. This, according to defendants, includes
9 evidence regarding diseases other than lung cancer, and evidence regarding addiction.
10 Defendants argue that any evidence that cigarettes cause any injury other than lung
11 cancer should be excluded consistent with the court's ruling on the motion in limine (Doc.
12 337).

13 As examples of this type of evidence, defendants cite one excerpt from deposition
14 testimony of Peter Lipowicz (Schreck Decl. Exh. 6); three excerpts from deposition
15 testimony of Sir Richard Doll (id. Exh. 8); one excerpt from deposition testimony of
16 Christopher Cook (id. Exh. 20); one excerpt from deposition testimony of Walker Merryman
17 (id. Exh. 21); and one excerpt from deposition testimony of James Figlar (id. Exh. 22). In
18 addition, defendants cite excerpts of their responses to written discovery stating that
19 smoking causes diseases other than cancer, excerpts of testimony of plaintiff and her
20 family members regarding her addiction to cigarettes, and an RJR advertisement
21 discussing heart disease.

22 As examples of evidence relating to addiction, defendants cite plaintiff's designations
23 of written discovery, excerpts from deposition testimony of Richard Jupe, Jeff Gentry, and
24 Jeanne Bonhomme (Schreck Decl. Exhs. 4, 16, 18), plus one document discussing the
25 physical effect of nicotine (id. Exh. 23), as well as statements by plaintiff's counsel at the
26 July 12, 2013 hearing to the effect that "our causation claim" is that "Nikki Pooshs was
27 addicted to cigarettes."

28 As a general proposition, the court will SUSTAIN objections to evidence of injuries

1 other than lung cancer allegedly caused by smoking cigarettes, based on prior rulings. As
2 with the objections to evidence of cigarette design discussed above, the difficulty lies in
3 determining which of the challenged designations and exhibits actually constitute evidence
4 of injuries other than lung cancer. Here, some of defendants' specific objections are
5 meritorious, but others are not.

6 In her response, plaintiff addresses only the issue of "non-lung cancer conditions,"
7 not the issue of addiction. As for defendants' examples of improper evidence regarding
8 "non-lung cancer conditions," plaintiff addresses only four (three deposition excerpts and
9 one document), and in two instances, refers to deposition excerpts that are not included in
10 defendants' objections.

11 First, with regard to the excerpt from the Oct. 12, 2011 deposition testimony of Peter
12 Lipowicz (Exh. 6), defendants cite 118:19-119:6 and 119:9-12 (asking with regard to the
13 Surgeon General's report whether it reported that cigarette smoking is one of the most
14 common causes of chronic bronchitis or COPD, to which Mr. Lipowicz answered "Yes;" and
15 asking whether there wasn't also a connection between smoking and other types of cancer
16 (but not specifically mentioning lung cancer), to which Mr. Lipowicz responded that "there
17 were studies that showed that – yes" but that "they hadn't concluded it yet as being enough
18 evidence").

19 Plaintiff cites the deposition at 118:19-120:6-10, which goes well beyond the portion
20 cited by defendants in their objections, and includes (at 120) a question as to whether "your
21 executives over the years continued to issue statements saying that there was no proof or
22 that the proof was insufficient that cigarette smoking caused lung cancer or any other
23 disease." (Oddly, plaintiff does not cite Mr. Jupe's response, just the question.) Plaintiff
24 claims that her designation does not focus on non-lung cancer conditions, but rather
25 demonstrates how defendants concealed information from her, and thus is relevant to her
26 failure-to-warn and concealment claims.

27 Plaintiff's comments are partially non-responsive, as she is including a portion of the
28 testimony that is not in the excerpt cited by defendants. With regard to the portion that

1 defendants do cite, there is no mention of lung cancer, but there is mention of other
2 diseases including other types of cancer. On balance, the court finds that it should be
3 EXCLUDED.

4 Second, with regard to the excerpt from the July 15, 1997 deposition testimony of
5 Walker Merryman (Exh. 21), defendants cite 147:1-148:6 (inquiring as to whether the
6 Tobacco Institute has ever sponsored research on cigarettes and cancer or on cigarettes
7 and heart disease, arterial sclerosis, stroke, emphysema, or COPD). However, in her
8 response, plaintiff cites a wholly different excerpt – 148:7-15, 149:8-24 (asking more
9 general questions re whether the Tobacco Institute has ever sponsored research on the
10 "health risks" of smoking cigarettes or ever issued publications on "smoking and health" at
11 any time from the 1960s to the mid-1980s).

12 Plaintiff asserts that "other evidence" shows that the Tobacco Institute was
13 defendants' "agent," and that this testimony (referring to above cited deposition excerpts)
14 demonstrates that despite their numerous public assurances, defendants never funded or
15 sponsored any studies designed to determine whether or not smoking caused lung cancer.
16 She claims that defendants concealed the fact that any studies they funded were designed
17 to disprove the causal link between smoking and lung cancer, which she asserts is relevant
18 to the failure-to-warn and concealment claims. Given that plaintiff is referring to a portion of
19 the Merryman testimony to which defendants appear not to have objected, these
20 comments are non-responsive. However, the fact that the testimony refers to diseases
21 other than lung cancer does not mean that it must be excluded, as it also refers to cancer.

22 Third, with regard to the excerpt from the August 17, 2011 deposition testimony of
23 RJR representative Christopher Cook (Exh. 20) (757:7-17) (inquiring whether Brown &
24 Williamson admitted prior to 1999-2000 that cigarette smoking was a cause of lung cancer,
25 emphysema, heart disease and other diseases, and asking whether or not it was true that
26 prior to that time, defendants denied there was sufficient evidence that cigarette smoking
27 was a cause of lung cancer, emphysema, heart disease, and other diseases), plaintiff
28 contends that in this testimony, defendants are attempting to justify their concealment of

1 facts, by claiming that their public statements were technically correct, because there was
2 no causal link between smoking and lung cancer, in that science demonstrated
3 association and risks but not causation. Plaintiff contends that this is the heart of her claim
4 that defendants disclosed some facts while at the same time failing to disclose other
5 important facts.

6 This testimony does refer to lung cancer, among other diseases. The court finds
7 that it cannot be excluded simply on the basis that it also mentions other diseases.

8 Fourth, with regard to the pre-1987 RJR publication "Of Cigarettes and Science"
9 (provided as Exh. D to the Declaration of Jason Rose, filed by plaintiff), defendants
10 describe this as an "advertisement," and plaintiff describes it as a "publication." It
11 discusses only the question whether science has demonstrated a causal connection
12 between smoking cigarettes and heart disease.

13 Plaintiff argues that this publication is another example of defendants' "active
14 concealment of the causal link between cancer and smoking." She acknowledges that this
15 publication "also addresses an association between smoking and heart disease," but states
16 that she "does intend" to use the advertisement for the purpose of presenting non-lung
17 cancer conditions, and intends to use it to show what defendants knew about smoking and
18 lung cancer. She claims this document is relevant to her failure-to-warn and concealment
19 claims.

20 The proposed exhibit does not reference lung cancer, only coronary heart disease.
21 Thus, it will be EXCLUDED.

22 7. Candy cigarettes

23 Defendants contend that plaintiff has improperly included evidence of "candy
24 cigarettes." As examples, defendants cite two documents from 1953 that are on plaintiff's
25 "will use" exhibit list – one that mentions chocolate cigarettes made for children and one
26 that mentions candy cigarettes for children (Schreck Decl. Exh. 24). Both documents are
27 primarily concerned with the subject of marketing Philip Morris cigarettes by appearances
28

1 by "Johnny Jr." at department stores.¹

2 In response, plaintiff argues that she understands the court's ruling and does not
3 plan on introducing evidence of candy cigarettes. However, she believes that defendants
4 are attempting to "inflame" the court by representing evidence as candy cigarette evidence
5 when it is not. She claims that these two exhibits are not candy cigarette evidence, but
6 rather are "youth marketing" evidence. Plaintiff started smoking when she was 13, and she
7 notes that the court denied defendants' motion to exclude "youth marketing" evidence.

8 Plaintiff is willing to redact the reference to chocolate cigarettes and candy
9 cigarettes, and claims that defendants have agreed. Thus, plaintiff argues, there is no
10 dispute here. Moreover, she asserts, the documents are relevant to "youth marketing."

11 If it is true that defendants have no objection to these documents assuming the
12 chocolate cigarettes and candy cigarettes references are redacted, then defendants'
13 objection is moot.

14 8. BATCo documents

15 Defendants argue that plaintiff has improperly included BATCo documents in her
16 exhibit list. They assert that because the court granted defendants' motion in limine to
17 exclude a 1984 BATCo document (Doc. 289), additional documents generated by BATCo
18 should also be excluded on the same basis. Defendants cite two examples (Schreck Decl.
19 Exhs. 50-51).

20 In response, plaintiff argues that defendants have misrepresented the scope of the
21 prior ruling, and have made no attempt to discuss the two exhibits at issue. Moreover, they
22 assert, one of the documents (Exh. 51) was not even authored by BATCo.

23 The objection to these two documents is OVERRULED. Exhibit 50 is not legible, so
24 it could not be presented to a jury in any event. As for Exh. 51, the court has no idea what
25 it is, and defendants provide no explanation other than that it is a BATCo document.
26 Plaintiff claims that it was not even authored by BATCo.

27 _____
28 ¹ In a prior filing, plaintiff stated that Johnny Jr. was less than four feet tall, and acted
as a "spokesperson" for Philip Morris for 40+ years, starting in the 1930s.

1 9. Prior testimony of Robert K. Heimann

2 Defendants assert that plaintiff has included prior testimony of Robert K. Heimann, in
3 violation of prior orders (citing Doc. 337). The only example defendants have provided is
4 plaintiff's designation of excerpts of videotapes of Mr. Heimann's testimony. In response,
5 plaintiff withdraws the designation. Defendants' objection is SUSTAINED.

6 10. Untimely designated additional evidence

7 Defendants contend that plaintiff has "untimely designated additional evidence" in
8 violation of court orders. Defendants' position is that because the original deadline for
9 plaintiff to identify proposed trial evidence was November 1, 2012 (per Doc. 157), plaintiffs'
10 subsequent new designations, submitted on June 19, 2013, September 3, 2013, November
11 1, 2013, and May 21, 2014, should be stricken as untimely.

12 Defendants contend that plaintiff's untimely designation of new material has stymied
13 their efforts to resolve disputes and prepare for trial. The only examples they cite are an
14 excerpt from the October 5, 2011 deposition transcript of Richard Jupe, which they claim
15 violates the order barring post-1987 evidence, and three new "composite exhibits" added
16 on May 22, 2014.

17 In response, plaintiff argues that the new designations were not untimely, because
18 the status of the case has changed since November 2012. The court granted additional
19 summary judgment motions and issued rulings on the scope of plaintiff's claims. In
20 addition, she asserts, there is currently pending an Offer of Proof on the concealment
21 claims, the ruling on which will likely further change the case.

22 Moreover, plaintiff asserts, the deposition excerpt cited by defendants was in the
23 original designation, and at least one of the composite exhibits was simply labeled
24 differently when it was previously submitted. (She says nothing about the other two.)

25 As an initial matter, the May 21, 2014 designations have already been stricken, so to
26 the extent that anything new was added there, it is no longer present. Second, the
27 submissions on the other dates were authorized by the court, although plaintiff was
28 certainly not given leave to add new designations. The objection as posed is

1 OVERRULED.

2 11. Evidence re advertising and promotion after July 1, 1969

3 Defendants acknowledge that when they sought to have excluded all affirmative
4 statements and advertisements, based on the court's having dismissed plaintiff's affirmative
5 misrepresentation claim, the court overruled that categorical objection, noting that the prior
6 ruling did not preclude the admissibility of affirmative statements or advertisements that
7 predate the immunity period, assuming some relevance to the concealment claim (Doc.
8 337).

9 Now, however, defendants argue that plaintiff has improperly included "evidence
10 regarding advertising and promotion after July 1, 1969." This is a somewhat different
11 issue, as it relates to Labeling Act preemption. Defendants cite as examples two excerpts
12 of deposition testimony by Jeanne Bonhomme, and three exhibits (out of what they claim
13 are "thousands" of exhibits that are either advertisements or documents that relate to
14 marketing and promotional activities).

15 In response, plaintiff asserts that preemption does not apply to the state law
16 concealment claim. She argues that part of the reason she started smoking and continued
17 to smoke was because of advertising and promotion. She contends that even if post-1969
18 advertisements and promotions are not admissible to prove concealment, they "could be"
19 admissible – "assuming a proper foundation is laid" – to prove "why plaintiff continued to
20 smoke." She claims that this evidence is relevant to her failure-to-warn and concealment
21 claims based on a duty not to deceive, and that Labeling Act preemption does not apply to
22 a state law concealment claim based on duty not to deceive (as the court previously ruled
23 in the Third Final Pretrial Order (Doc. 337)).

24 The objections are SUSTAINED in part and OVERRULED in part. Contrary to
25 plaintiff's ongoing argument, it is not true that preemption does not apply to any aspect of
26 her concealment claim. See, e.g., Order re Plaintiff's Offer of Proof. Thus, plaintiff may not
27 present evidence in the form of post-1969 advertisements and promotions to support her
28 claim that defendants concealed the health risks of smoking, because such a claim is

1 preempted by the Labeling Act. There is nothing that precludes plaintiff from arguing
2 generally that she started smoking and/or continued to smoke because she was persuaded
3 to do so by defendants' advertising, but she cannot argue that those advertisements or
4 promotions were fraudulent because they concealed the health risks of smoking.

5 12. Evidence re brands plaintiff never smoked and brands made by non-party
6 manufacturers

7 Defendants argue that plaintiff has improperly included "evidence regarding brands
8 [p]laintiff never smoked and brands made by non-party manufacturers," including hundreds
9 of advertisements for brands produced by non-parties, as well deposition testimony by
10 plaintiff regarding cigarettes she smoked at one time but later stopped smoking because
11 she found them too strong. As examples, in addition to the advertisements (Schreck Decl.
12 Exhs. 52, 26) defendants cite an excerpt from the deposition testimony of Jeanne
13 Bonhomme (Schreck Decl. Exh. 14).

14 In response, plaintiff claims that evidence regarding brands she did not smoke and
15 brands manufactured by non-parties is relevant, but she does not clearly explain why. She
16 asserts that her entire smoking history is at issue, and it is likely that she used some
17 cigarettes manufactured by non-defendants (an understatement, given that there were
18 originally 22 defendants, most of which were cigarette manufacturers). She also argues
19 that because she must show that defendants' product had risks that were known or
20 knowable, defendants' research regarding brands other than their own is relevant to her
21 failure-to-warn and concealment claims.

22 Defendants' objections are SUSTAINED. The court has previously ruled that plaintiff
23 may not introduce evidence of cigarettes manufactured by tobacco companies that are not
24 defendants in this case.

25 13. Evidence of advertising and statements plaintiff could not have seen

26 Defendants contend that plaintiff has improperly included "evidence of advertising
27 and statements [p]laintiff could not have seen." This includes thousands of
28 advertisements published years before plaintiff was born in 1941, advertisements that give

1 no indication when or where they were published, and press releases that were not
2 available to the general public, including plaintiff. As examples, defendants cite numerous
3 advertisements (Schreck Decl. Exhs. 30-37), plus press releases from Hill & Knowlton, the
4 Tobacco Institute, and the Tobacco Industry Research Committee (Schreck Decl. Exhs. 27-
5 29), claiming there is no evidence that plaintiff ever saw any of them.

6 In response, plaintiff argues that the court has already overruled defendants' motion
7 in limine to exclude reference to defendants advertising and marketing, including alleged
8 youth marketing (Doc. 289). She asserts that advertisements and public statements have
9 "independent relevance" regardless of whether plaintiff saw them. For example, one of the
10 H&K press releases cited by defendants (PTO2446) presented the position of the tobacco
11 companies (including Philip Morris and RJR) in March 1965 regarding the Labeling Act, and
12 asserted that it was unproven that smoking caused lung cancer. Plaintiff claims that while
13 she may not remember the specific document, she does remember defendants "conduct."
14 She asserts that this document "demonstrates" that conduct.

15 The second document that plaintiff addresses is PTO 2556 – the "Frank Statement,"
16 a press release that was sent out on January 4, 1954. The court previously denied
17 defendants' motion in limine to exclude the Frank Statement, finding that it was arguably
18 relevant to the concealment claim. Doc. 289. Plaintiff complains that defendants are once
19 again asking the court to reconsider its prior rulings.

20 Finally, plaintiff argues that it would be unfair to exclude advertisements and other
21 documents just because she never saw them, because defendants' exhibit list is loaded
22 with documents she never read or saw.

23 The objection is SUSTAINED in part and OVERRULED in part. Certainly
24 advertisements that predate 1941 cannot be used to support a concealment or failure-to-
25 warn claim brought by someone who was born in 1941. However, the court is not
26 persuaded that all the advertisements should be excluded for the primary reason argued by
27 defendants – simply because plaintiff did not see them. As for the press releases, to the
28 extent they were issued post-1941 and plaintiff can show that they reflect the public

1 position of defendants, they are arguably relevant.

2 14. "Youth marketing" evidence

3 Defendants assert that certain examples of "youth marketing" evidence should be
4 excluded. They acknowledge that the court previously denied their motion in limine to
5 exclude advertising including "youth marketing" advertising, but argue that certain
6 deposition testimony and exhibits are inadmissible because they relate to a period of time
7 after plaintiff was no longer a minor, and thus not available as target for "youth marketing."
8 As examples, defendants cite numerous excerpts of deposition testimony of Jeanne
9 Bonhomme (Schreck Decl. Exhs. 14, 38), as well as excerpts of deposition testimony of
10 Walker Merryman (id. Exh. 39), and James Figlar (id. Exh. 40), along with four documents
11 that are dated after the time when plaintiff was a minor (Schreck Decl. Exhs. 53, 41-43).

12 In opposition, plaintiff notes that the court already denied this motion when it was
13 made as a motion in limine. She also contends that this new argument – that some of the
14 advertisements that targeted youth were published in the years after she reached her
15 majority – is overbroad, because in her view, it is relevant to show that defendants likely
16 practiced that same behavior when she was a youth. She does not address any of the
17 cited deposition excerpts, but does note that at least one of the documents cited by
18 defendants (PTO1233 – Exh. 53), while dated in the 1970's, discusses youth marketing
19 plans or projects back in the 1950s.

20 The objection is OVERRULED. The court has already ruled that evidence relating to
21 youth marketing will not be excluded. (Doc. 289). Defendants previously made a similar
22 argument – that most of the youth marketing evidence was created after plaintiff had
23 reached the age of majority – and the court will not revisit the issue at this point.

24 15. Advertisements purportedly showing cigarettes as "attractive or glamorous"

25 Defendants contend that plaintiff's counsel state they intend to show "one or two
26 ads" from a "composite exhibit" that includes more than 350 separate advertisements, all of
27 which plaintiff claims show smoking cigarettes as "attractive or glamorous." Defendants
28 argue that most of these advertisements should be excluded based on the above

1 objections, but also complain that plaintiff has stated she might use "one or two" of the
2 advertisements in a composite exhibit, but has not indicated which ones those might be.

3 In response, plaintiff notes that the court previously denied defendants' motion in
4 limine to exclude advertisements. She also argues that defendants have provided no legal
5 basis to exclude this category of advertisements, and have not attempted to show how they
6 will be prejudiced if this evidence is presented to the jury. She contends that
7 advertisements are essential to show why she started smoking and continued to smoke.

8 The objection is OVERRULED. Defendants have not met their burden of showing
9 that an entire category of exhibits should be excluded. In addition, however, the court
10 notes that it is unable to rule on the admissibility of a category of exhibits without viewing
11 some representative examples. Here, defendants have included four advertisements for
12 "Kensitas" cigarettes (Schreck Decl. Exh. 44) – a brand with which the court is unfamiliar.
13 The advertisements do not include any indication that the cigarettes were manufactured by
14 Philip Morris or RJR. The court has already ruled that plaintiff may not introduce evidence
15 relating to cigarettes manufactured by tobacco companies other than Philip Morris or RJR.

16 16. Objections to witness list

17 Defendants claim that in a recent submission, plaintiff asserts that Dr. Farone will
18 testify regarding his "awareness" of Philip Morris' knowledge and the motivations behind
19 Philip Morris' conduct, and also states that he will testify regarding RJR's "knowledge" and
20 motivation.

21 Defendants object to this designation, noting that the court previously ruled that no
22 witness may testify as to the "intent" of the tobacco companies unless the witness wrote the
23 document at issue and is testifying about his/her intent at the time the document was
24 written. (Doc. 289). In addition, they note, the court found that while Dr. Farone could
25 testify regarding what he witnessed while employed by Philip Morris, he was not qualified to
26 testify about what Philip Morris "understood" about cigarette design at any time, and was
27 not qualified to testify about RJR because he never worked there. (Doc. 229).

28 Defendants also object to plaintiff's description of the proposed testimony of Dr.

1 Smith and Dr. Horn, on the basis that the court has already excluded some of the proposed
2 testimony.

3 In response, plaintiff asserts that defendants' objections to plaintiff's witness list is "a
4 waste of . . . time." Plaintiff does not respond to defendants' argument about the Farone
5 designation. Instead, she focuses on her description of Dr. Horn's proposed testimony re
6 his diagnosis of plaintiff's "lung cancer and related diseases," asserting that defendants
7 want the designation changed to read simply "lung cancer."

8 This type of nonsensical dispute is barely worthy of comment. Certainly the
9 defendants' objection does not relate to a "category" of evidence. The court will say only
10 that it has already ruled as to what Dr. Farone may and may not testify to (Docs. 229, 289),
11 has already ruled that Dr. Smith may not opine that smoking caused plaintiff's lung cancer
12 (Doc. 288), and has already ruled that plaintiff may not present evidence of injuries other
13 than lung cancer (Doc. 337).

14 17. Objections to exhibit list

15 In addition to the above objections, defendants argue that plaintiff's exhibit list
16 contains improper composite exhibits, and that plaintiff has included "history books"
17 regarding smoking, which they contend should be excluded as prejudicial. The arguments
18 regarding the composite exhibits are set forth above, at 3.

19 With regard to the "history books," defendants assert that these books were written
20 by anti-tobacco advocates and are purportedly based on "tobacco industry" documents.
21 Defendants list four of these exhibits and object to them on the basis that they contain
22 multiple hearsay without exception, are prejudicial, and advocate a total ban on tobacco, a
23 position that is at odds with established Congressional policy.

24 In response, plaintiff contends that she does not plan on introducing entire books
25 into evidence, but rather intends to use excerpts from the books to question experts and
26 defendants' corporate witnesses. She says she requested exhibit numbers for ease of
27 "working with the book" at trial, and also to give defendants some "advance notice" of the
28 materials she plans on using at cross-examination. She reiterates that no evidence will be

1 introduced at trial without a stipulation by the parties or the laying of a proper foundation.

2 If plaintiff does not intend to seek to have these books admitted into evidence, they
3 do not belong on the exhibit list.

4

5 **IT IS SO ORDERED.**

6 Dated: December 2, 2014



7 PHYLLIS J. HAMILTON
8 United States District Judge